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LEGAL UPDATE

1. DBD to Consider Opening Certain Businesses to Foreign Competition

For the last four years, the Department of Business Development, a regulator under the Foreign Business Act, B.E. 2542 (1999) (the "FBA") has been actively investigating and prosecuting the use of nominee Thai shareholders in a company that engages any of the restricted businesses under the FBA to get around the restrictions under the FBA and the restriction on the land ownership under the Land Code. Technically, the practice amounts to the FBA violation.

The FBA prohibits a foreign owned company from engaging in certain restricted businesses. The restricted businesses under the FBA are classified into three categories:

- Businesses under Schedule 1 (Strictly closed to foreign competition);
- Businesses under Schedule 2 (Open for applying a license); and
- Businesses under Schedule 3 (Open for applying a license).

The businesses under Schedule 1 are completely closed to foreign competition, thus a foreign owned company is strictly prohibited from operating the businesses under Schedule 1. This means the FBA does not allow a foreign owned company to file a foreign business license application for any Schedule 1 business.

The businesses under Schedule 2 and Schedule 3 are not completely closed to foreign competition as the FBA makes impossible for a foreign owned company to apply for a foreign business license to engage in any business under Schedule 2 and Schedule 3. And if the license is granted, the foreign owned company may operate the restricted business under the license.

Recently, the Director-General of the department indicates that the Ministry of Commerce has established a subcommittee to review the restricted businesses under Schedules attached to the FBA in order to remove certain businesses out of the Schedules. The FBA mandates the Foreign Business Board, a decision making body under the FBA, to review the types of the restricted businesses under the Schedules attached to the FBA on an annual basis and make a proposal to the Cabinet.

In 2013, the Royal Decree and the Ministerial Regulation were enacted to remove certain securities businesses and the agricultural products future trading from Schedule 3 attached to the FBA.

The Director-General hints that the department is considering what is the routine work or the businesses that the department typically grants the license as the potential candidates for removal from Schedule 3 attached to the FBA. The criteria for consideration for the businesses to be removed and opened for a foreign competition is as follows:

(i) the business that has no impact on the Thai-owned traditional businesses,
(ii) the business that the Thais can compete with,
(iii) the business that typically a foreign owned company is granted a foreign business license to operate, or
(iv) the business that another Thai government has already regulated.

One of the department's current concerns is a non-AEC investor will set up a company in any jurisdiction in the ASEAN Economic Community (the "AEC") and attempt to operate the restricted business in Thailand under the AEC privileges as an AEC company. The department disagrees with any effort to exploit the AEC privileges by any non-AEC investor.

As far as past precedent is concerned, under the Thai-United States Treaty of Amity, a non-US investor cannot simply go to Delaware to incorporate a Delaware corporation and use the Delaware corporation to operate the restricted businesses in Thailand as a US-owned entity under the treaty. The US Embassy does not allow such practice. Consequently, it will be up to the department to leave the issue to the embassies to verify the AEC's status or take certain measure to verify the AEC status by itself. Many jurisdictions in the AEC are popular for setting up an international business company as a holding company due to low tax or no tax, e.g. Singapore, Malaysia and Brunei.

For more information, please contact our lawyers for consultation.

2. Use of Average Method in Determining the Cost of Sold Securities

As the governments around the world keep printing the money out of thin air without backing of the gold but the full faith of the government that issues the bank notes, the interest rate has remained low for years. Even for companies, keeping any unused cash in bank deposits or money market funds yields a low rate of return. Increasingly, in an effort to chase high return, companies in Thailand put their unused cash in stocks, and property mutual funds.

Unlike an individual taxpayer, a company is not exempt from income tax on a capital gain derived from a sale of stock. Thus, the company has to record the cost of sold securities to determine a gain (or loss) derived from a sale of securities. However, once any company keeps trading too much, it might be extremely difficult, if not impossible, for the company to track and record the cost of each security it sells in computation of a gain (or loss) derived from the sale of securities for a tax purpose.

Now the Revenue Department issues the new ruling outlining the acceptable methods for determining the cost of sold securities in two scenarios.

Scenario 1: Actual Cost

If there is sufficient evidence to clearly identify the cost of sold securities, a seller company must use the actual cost of the sold securities to compute a gain (or loss) for the purpose of paying corporate income tax.

Scenario 2: Average Method

If there is insufficient evidence to clearly identify the cost of sold securities, a seller company may choose to compute the cost of sold securities by the average method under the generally accepted accounting principles. In the event that the securities are scriptless, once a seller company chooses any method for computation of the cost of sold securitues, the seller company must continue to use the same method indefinitely regardless of whether the sold securities are the same type or the different type for the purpose of computation of corporate income tax.

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